

**BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION**

INQUIRY CONCERNING A JUDGE, NO. 01-244  
(Judge Charles W. Cope)

Case No. SC01-2670

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**RESPONSE TO EMERGENCY MOTION TO COMPEL**

The Special Counsel responds to the Emergency Motion to Compel filed by Respondent and states:

1. The motion to compel seeks production of a one-page report by a private investigator retained by the Commission in investigating the charges against Judge Cope pursuant to JQC Rule 12(b).

2. The Special Counsel objects to this request pursuant to Article V, section 12(a)(4), which mandates that the report, which was generated as a part of the investigative proceedings prior to the filing of formal charges. See also In re Graziano, 696 So. 2d 744 (Fla. 1997). To the extent JQC Rule 12(b) could otherwise be read to require production of the report, the rule expressly provides that production of statements is required "except those documents confidential under the Constitution."

3. The Special Counsel further objects to this request pursuant to Rule 1.280(b)(3), Florida Rules of Civil Procedure, which is applicable to these proceedings pursuant to JQC Rule 12(a). The report was prepared in anticipation of litigation or for trial by and for the Commission's representative – its investigator.

4. The Special Counsel further objects to this request because production is not required by JQC Rule 12(b), which requires production only of "written statements and transcripts of testimony of" witnesses the Special Counsel expects to call. A report by an investigator of his conversations with a witness – which report has not been read by, adopted by, approved by, or signed by the witness – cannot

be considered a statement of the witness.

5. The Supreme Court's order from the Holloway case, which is the sole legal authority relied upon by the Respondent is not controlling. First, the order was not published and therefore has no precedential effect. Second, all of the arguments discussed above were not raised before the Supreme Court, who order briefing within 24 hours. Third, the Supreme Court lacked jurisdiction to issue the order in the Holloway case. Pursuant to JQC Rule 21, "the Florida Rules of Appellate Procedure and Rule 2.140 of The Florida Rules of Judicial Administration shall be applicable to reviews of Investigative and Hearing Panel proceedings by the Supreme Court. Neither Rule 2.140 or any of the appellate rules provide for direct appellate review of nonfinal discovery orders. Certiorari relief was not requested in that case, the Supreme Court did not indicate that it was conducting certiorari proceedings, and, in any event, a writ of certiorari would not have been appropriate in that case. Finally, on information and belief, the issue in that case was factually distinguishable from the issue in this case.

6. Alternatively, the Special Counsel submits that the report at issue does not contain "vital impeachment evidence" or any other evidence that Respondent cannot obtain by simply deposing Dr. Jeanes.

7. There is no emergency warranting a prompt hearing in this case. To adequately set forth and develop its arguments, the Special Counsel needs time to prepare an appropriate memorandum of law. On Tuesday, December 18, 2001, the Special Counsel informed Respondent's counsel, Robert Merkle, that the report would not be produced. While Respondents' attorney threatened a motion to compel, he did not file his motion for nearly a month, and it is now less than a week before Nina Jeanes' scheduled deposition.

8. This issue is of profound importance to the functioning of the Commission's Investigative Panel. An adverse ruling will hinder the ability to adequately investigate charges before filing a notice of formal proceedings, which may prejudice the rights of future judges targeted by allegations of judicial misconduct. Additionally, an adverse ruling will chill witnesses from providing the Commission's investigator with information relevant to charges of judicial misconduct. For these reasons, a decision to grant the motion to compel should not be made until the Panel has had the benefit of thorough briefing by the parties. The Special Counsel has had less than three hours to review the motion and prepare this response.

WHEREFORE, the Special Counsel requests that Respondent's Emergency Motion to Compel be denied or, in the alternative, that the Court set a briefing schedule in this matter allowing the Special Counsel at least ten (10) days to brief the issues.

### **CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by facsimile mail to: **Louis Kwall, Esq.**, Kwall, Showers & Coleman, P.A., 133 N. St. Harrison Ave., Clearwater, Florida 33755; **Robert W. Merkle, Jr., Esq.**, Co-Counsel for Respondent, 5510 W. La Salle Street, #300, Tampa, Florida 33607-1713; **Judge James R. Jorgenson**, Chair of the Judicial Qualifications Commission Hearing Panel, 3rd District Court of Appeal, 2001 S.W. 117th Ave., Miami, Florida 33175-1716; **John Beranek, Esq.**, Counsel to the Hearing Panel of the Judicial Qualifications Commission, P.O. Box 391, Tallahassee, Florida 32301; **Brooke S. Kennerly**, Executive Director of the Florida Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303; **Thomas C. MacDonald, Jr., Esq.**, General Counsel to the Investigative Panel of the Judicial Qualifications Commission, 100 North Tampa Street, Suite 2100, Tampa, Florida 33602., and be facsimile to **John Beranek, Esq.**, Counsel to the Hearing Panel of the Judicial Qualifications Commission this 16th day of January, 2002.

By:  
John S. Mills, Esq.  
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